Supreme Court, U.S.
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NO. 91-348

In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM AND PATRICIA CRISMAN,
PETITIONERS

VERSUS

ODECO, INC.,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Submitted by:

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RESPONSE TO PETITIONERS' QUESTION PRESENTED

William and Patricia Crisman have characterized the question presented for review as follows:

> In coming to summary judgment, did the Fifth Circuit weigh the evidence and thereby deny the Crismans the jury trial they are entitled to under the Jones Act?

This question incorrectly suggests that the Fifth Circuit affirmed the granting of summary judgment in favor of ODECO, Inc. where a genuine issue of material fact existed. However, the Fifth Circuit specifically found that there was no genuine issue as to any material facts in affirming the district court's ruling. As the Fifth Circuit stated:

> Crisman also contends that even if his claim was prescribed, this was a determination for a jury, and not a judge, to make. What Crisman ignores, however, is that even looking only at evidence supporting Crisman, *see Wilkerson v. McCarthy*, 336 U.S. 53, 57, 69 S.Ct. 413, 415, 93 L.Ed. 497 (1949), this case was one appropriate for summary judgment. The district court's decision can rest squarely upon only the items submitted by Crisman. The court was not weighing the evidence, as Crisman contends, but rather evaluating a case that presented no disputed facts material to the limitations issue. While evaluating when a plaintiff reasonably was put on notice ordinarily is a factual determination, in this case there was such an overwhelming array of evidence indicating that the case was time-barred that summary judgment was appropriate. Considering that the burden was on Crisman to establish compliance with the statute of limita-

> tions, *cf. Emmons,* 701 F.2d at 1117, the district court did not usurp the jury's fact-finding function by granting summary judgment.

(*See Crisman v. ODECO, Inc.*, 932 F.2d at 417, n.4, appearing in petitioners' Appendix to Petition at A-8.) The Fifth Circuit directly addressed the issue Crisman now raises, and it is clear that the Fifth Circuit and the district court applied the proper legal standards, as both courts found there was *overwhelming* evidence supporting summary judgment. In view of the foregoing, there is no proper question presented for review.

TABLE OF CONTENTS

Page

Response To Petitioners' Question Presented i

Table Of Contents iii

Table of Citations And Authorities iv

Statement Of The Case 1

Summary Of Argument 5

Argument 5

Conclusion 11

Certificate Of Service 13

TABLE OF CITATIONS AND AUTHORITIES

CASES **Page**

Albertson v. T. J. Stevenson and Co.
749 F.2d 223 (5th Cir. 1984) 6

Anderson v. Liberty Lobby, Inc.
477 U.S. 242, 106 S.Ct. 2505 (1986) 11

Celotex Corp. v. Catrett
477 U.S. 317, 106 S.Ct. 2548 (1986) 11

Clay v. Union Carbide Corp.
828 F.2d 1103 (5th Cir. 1987) 6

Emmons v. Southern Pacific Transportation Co.
701 F.2d 1112 (5th Cir. 1983) ii,9

Hagerty v. L & L Marine Services, Inc.
788 F.2d 315, *modified*, 797 F.2d 256 (5th Cir. 1986) 6

Wilkerson v. McCarthy
336 U.S. 53, 69 S.Ct. 413, 93 L.Ed. 497 (1949) i

STATEMENT OF THE CASE

Both the district court and the Fifth Circuit relied extensively on the deposition testimony of William Crisman (hereinafter "Crisman") in ruling that his claims under the Jones Act, 46 U.S.C. §688, and the General Maritime Law (as well as his wife's claim for loss of consortium) had prescribed. Crisman's deposition testimony establishes, without a doubt, that he had actual knowledge of the critical facts of his injury and its cause many, many years prior to his filing of suit on September 8, 1988.

Crisman worked for ODECO, Inc. (hereinafter "ODECO") as a mechanic beginning in 1970. His work was primarily aboard drilling rigs in the Gulf of Mexico, and he worked seven (7) days on and was then off work for seven (7) days. While working aboard the D/B RIMTIDE in 1970, Crisman claims to have been exposed to Glidden brand paint, which caused him severe headaches, burning in his lungs, eyes, sinuses, throat and nose, and caused pressure behind his eyes. This was 18 years before Crisman filed suit. Crisman testified that it took three (3) to four (4) days for him to recover from this incident and he did not report the incident to anyone with ODECO.

Crisman was then transferred to another rig, where he performed welding within the stability tanks. Crisman testified that fumes from the welding operations caused him more headaches and sinus problems, which continued during the six (6) years he was assigned to that rig. These problems always resolved when Crisman returned home for his seven (7) days off from work. Crisman neither advised ODECO of these problems nor consulted a physician for his complaints.

In 1975 or 1976, Crisman worked on yet another rig

for ODECO, where he was again exposed to Glidden paint. Crisman again experienced persistent headaches and the respiratory problems he had previously experienced from exposure to paint. He also came in contact with other chemicals such as paint thinners, which he testified caused him problems. Crisman did not seek treatment from any physician for this condition because the condition always cleared up when he went home from work and was away from the chemicals and paint fumes. (*See Crisman v. ODECO, Inc.*, 932 F.2d at 414, appearing in petitioners' Appendix to Petition at A-1-2.) He testified:

Q. When you would go home, would the condition clear up?

A. Yeah.

Q. When you would get away from the paint, would it clear up?

A. Yes.

Q. And you were working 7 on and 7 off?

A. Yes, sir.

Q. And would this occur on every hitch just about?

A. Just about.

* * *

Q. On the OCEAN LEADER from '75 through '76, did this occur that whole time?

A. Yes.

* * *

Q. And when you would go home in '75, '76, '77, '78, all the way to '86, would these conditions diminish any and go away?

A. Yes.

Q. So it was only when you were on the rig that you were really experiencing these things?

A. Yes.

(Deposition exhibit, pp. 55-56, 59; 1R 48-49, 52)

By 1978 or 1979, Crisman made his first complaints to supervisors and co-workers about these headaches. Crisman did not request a transfer to another job or indicate that his headaches were anything extraordinary. (*See Crisman v. ODECO, Inc.*, 932 F.2d at 414, appearing in petitioners' Appendix to Petition at A-2.) In Crisman's Petition, he asserts that his complaints indicated that he was "having trouble in the nature of an occupational disease". This is clearly a misstatement of fact, as nowhere in Crisman's deposition testimony did he state that he made any complaint to anyone with ODECO other than that paint fumes gave him headaches (and that "everyone had headaches").

Crisman's health insurance records from 1983, five (5) years before suit was filed, indicate Crisman was suffering from "allergic rhinitis", and further indicate that the symptoms arose in "1963, worse in recent times". Seventeen (17) claim forms signed by Crisman between 1984 and 1987 show his condition as having arisen in 1963. On the form signed by Crisman on September 26, 1987, he stated that his illness resulted from his occupation and noted that the duration of his illness was over 20 years. (*See Crisman v. ODECO, Inc.*, 932 F.2d at 414, appearing in petitioners'

Appendix to Petition at A-2.)

One of the physicians Crisman consulted prior to 1979, Dr. G. D. Sagrera, testified that he told Crisman his respiratory injuries were "contact type" conditions. He testified: "I think that was some contact type of allergy, something either that he took in internally or that he touched."

Q. Do you have any opinion about the cause of his allergic problems?

A. I think they were basically environmental things, things that he had breathed in, as is a very common problem in this part of the country.

Q. Would you have discussed that, the causes of those allergies, with Mr. Crisman at the time of your treatment?

A. Yes.

Deposition exhibit, p. 23; 3R 551)

In his Petition, Crisman does not even raise the issue of his alleged hearing loss claim. The medical evidence clearly established that Crisman knew for a fact that he had a hearing loss and the cause of that hearing loss at least ten (10) years prior to filing suit. In 1976, Dr. Sagrera identified Crisman's hearing loss and discussed with him that its source was heavy machinery noise. Another hearing specialist consulted by Crisman, Dr. Clyde E. Landrum, discussed with Crisman in 1978 the fact that noise exposure had caused Crisman's hearing loss and that he should wear some type of hearing protection on the job. (*See Crisman v. ODECO, Inc.*, 932 F.2d at 414-415, appearing in petitioners' Appendix to Petition at A-2-3.)

SUMMARY OF ARGUMENT

The Petition For A Writ of Certiorari filed by the Crismans does not present any legal or factual basis or other good cause to support either the granting of the requested writ or the need for briefs or argument on the merits. Crisman misstates the basis for the Fifth Circuit's ruling, which affirms the dismissal of Crisman's claims, and ignores most of the facts that the Fifth Circuit relied upon. Crisman suggests that the Fifth Circuit's opinion is flawed in that it contains an irreconcilable conflict which presents a genuine issue of material fact for jury consideration. This is an artifice created by counsel, which a clear reading of the Fifth Circuit's decision reveals is not correct. There are no issues presented in the Crismans' Petition worthy of consideration by this Court. Both the district court and the Fifth Circuit applied the proper legal standard to undisputed facts in finding that the Crismans' claims have prescribed.

ARGUMENT

Crisman argues that the Fifth Circuit based its decision to uphold the granting of summary judgment on the fact that Crisman made complaints to his supervisors and co-workers that paint fumes gave him headaches during his employment with ODECO. He further alleges that the Fifth Circuit considered that those complaints, while sufficient for establishing prescription, were insufficient for establishing a "continuing tort" theory under the Jones Act. This overly simplistic view of the Fifth Circuit's consideration of this case ignores most of the evidence and totally misconstrues the Fifth Circuit's analysis.

The Fifth Circuit stated that the test to be applied in determining whether Crisman's claims had prescribed is as follows:

> A cause of action under the Jones Act and general maritime law accrues when a plaintiff has had a reasonable opportunity to discover his injury, its cause, and the link between the two. *Albertson v. T. J. Stevenson & Co.*, 749 F.2d 223, 228 (5th Cir. 1984).

(*See Crisman v. ODECO, Inc.*, 932 F.2d at 415, appearing in petitioners' Appendix to Petition at A-3.) Further, in a "traumatic event/latent manifestation" case, such as was found to exist here, the "Time of Event Rule" applies:

> It is generally accepted that a cause of action for a tort accrues when there has been an invasion of the plaintiff's legally protected interest. Ordinarily, this invasion occurs at the time the tortious act is committed. If some injury is discernible when the tortious act occurs, the Time of Event Rule respecting statutes of limitations applies, and the plaintiff's cause of action is deemed to have accrued. If the plaintiff later discovers that his injuries are more serious than originally thought, his cause of action *nevertheless accrues on the earlier date, the date he realized that he had sustained harm from the tortious act.*

(*See Crisman v. ODECO, Inc.*, 932 F.2d at 415, appearing in petitioners' Appendix to Petition at A-4)

Applying the standards established by the Fifth Circuit in *Albertson, supra; Hagerty v. L & L Marine Services, Inc.*, 788 F.2d 315, *modified*, 797 F.2d 256 (5th Cir. 1986); and *Clay v. Union Carbide Corp.*, 828 F.2d 1103 (5th Cir. 1987), the Fifth Circuit found that Crisman's claims were barred by the three-year prescriptive period because: "Crisman had both actual and constructive knowledge of his injury long before 1985." (*See Crisman v. ODECO, Inc.*, 932 F.2d

at 415, appearing in petitioners' Appendix to Petition at A-3.)

The Fifth Circuit explained:

> [W]e agree with the district court that "Crisman's deposition is replete with testimony that indicates that he was aware or should have been aware of his illness." ... Crisman admitted in his deposition that he actually knew *at the time of exposure* that the paint and solvent fumes caused his physical problems and that he had complained to his supervisors and co-workers about the substances. Furthermore, Crisman states in his deposition that these symptoms occurred *only* at work and disappeared when he left work for extended periods of time, a fact that we already have held should put a plaintiff on notice that he has suffered an injury ... By the early 1980's, Crisman experienced these problems *almost every time* he went to work .... All these factors were sufficient to support the district court's determination, especially considering that the burden was "on the claimant to allege and to prove that his cause of action was commenced within the three-year period.
>
> Crisman's symptoms, which occurred only at work, and which by his own admission he knew were connected to the materials he used at work, put him on notice that he had suffered a work-related injury.

(See *Crisman v. ODECO, Inc.*, 932 F.2d at 416, appearing in Petitioners' Appendix to Petition at A-6, A-7, emphasis in original, citations and notes omitted.)

What was determinative to the Fifth Circuit was

Crisman's knowledge — knowledge that his own deposition testimony establishes. Under the test established by the Fifth Circuit, a test which Crisman does not dispute is the proper legal standard for prescription in a Jones Act case, if an injured worker has the reasonable opportunity to discover the critical facts of his injury and its cause, he is required to file suit within three (3) years from the event causing injury. The Fifth Circuit found, based on Crisman's deposition testimony, that beyond having the opportunity to discover the critical facts of his injury and its cause, Crisman had *actual knowledge* that he was injured by the chemicals he came in contact with and knew that these injuries were related to his employment.

The only time Crisman experienced problems was when he was at work. The problems always resolved completely when he went home for his seven (7) days off. This alone supported the district court's dismissal of Crisman's claims. There was and is no question for a jury to decide. The uncontested material facts were established by Crisman's own deposition testimony.

The issue of the health insurance claims forms which Crisman raises in his Petition is nothing more than a "red herring". As Crisman admits, the Fifth Circuit found that this evidence was merely cumulative to Crisman's own deposition testimony. This Court does not have to concern itself with whether Crisman "carried a typewriter under his arm to his doctor's office", as his attorneys suggest. This does not give rise to a jury question. It does not because it raises no *genuine* issue as to any *material* fact. The Fifth Circuit found that Crisman's deposition testimony alone conclusively showed his knowledge of the critical facts of his injury and its cause. (*See Crisman v. ODECO, Inc.*, 932 F.2d at 416, appearing in petitioners' Appendix to Petition at A-7.)

Crisman next turns to his "continuing tort" theory to argue that the Fifth Circuit improperly interpreted its own decision in *Emmons v. Southern Pacific Transportation Co.*, 701 F.2d 1112 (5th Cir. 1983). This is simply incorrect. Under *Emmons*, in order to establish a "continuing tort" theory, the employee must establish that an employer negligently or intentionally continued to inflict new harm upon its injured employee. The employee must establish that the employer knew of the employee's condition and its impact on him. In *Emmons*, the "continuing tort" theory was rejected, as the employer did not have knowledge of an *injury* and Emmons never requested a transfer from his position to a position which would not further aggravate his injury.

Crisman does not allege that he ever requested a job transfer. He does not allege that he complained to ODECO that he could not perform his job as a mechanic because he was experiencing headaches. Crisman cites certain passages from his deposition to support his position, although he fails to provide this Court with the full excerpts of his testimony. For example:

> Q. And tell me, in '78 or '79, what did you do about it when you got these headaches or what else did you get?
>
> A. Well, just headaches and, you know, looking back, at the time I was just realizing headaches and I was trying to isolate the area where I would be at from the paint fumes, which at the time was impossible. To make sure all the doors were shut in the living quarters to try and keep the stuff out of the living quarters and I reported it to the toolpusher.

(Deposition exhibit, pp. 53-54)

Q. And when that started, you started realizing that in '78 or '79, did you go to a doctor?

A. No.

Q. Why not?

A. A lot of people had headaches.

(Deposition exhibit, p. 55)

These excerpts, and the excerpt recited by Crisman in his Petition, illustrate what complaints he made. Crisman complained that he had headaches from paint fumes *in the living quarters* on the rig. Crisman described this as follows: "Crisman complains to his superiors, his fellow seamen, and indicates that he is having trouble in the nature of an occupational disease." (*See* Petition at 6.) Nowhere does this appear in the facts — not in Crisman's deposition testimony, submitted by ODECO in support of its original Motion For Summary Judgment, and not by Crisman in the Affidavit he submitted in opposition to that Motion. Crisman never complained that he was suffering from an occupational disease. The only complaints he made were due to headaches he and others suffered because of paint fumes in the living quarters of the rig.

This is not evidence of a genuine issue of material fact. It is simply window dressing by his attorneys, another "red herring". Crisman did not tell anyone at ODECO what he now alleges in his Petition to this Court. There was not an improper weighing of evidence by the Fifth Circuit. *There is an absence of evidence entirely.*

This Court has established the proper standards to be utilized by a district court in considering a motion for

summary judgment. The standard is not, as Crisman alleges, whether there is "a complete absence of probative fact", but rather, whether there is a *genuine* issue of *material* fact such that resolution of that dispute should be left to trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986). There is no diapute as to what Crisman has sworn to under oath with regard to the physical complaints he allegedly suffered and when those complaints arose. There is also no question as to what complaints were made by Crisman to ODECO. This was the basis for the district court's ruling on Motion For Summary Judgment, the facts which are in evidence. Crisman's deposition testimony overwhelmingly established that his claims are time-barred. The Fifth Circuit affirmed that ruling, applying the proper legal standards and based on Crisman's own testimony. The Fifth Circuit did not, nor did it have to, "weigh the evidence". The evidence is clear.

CONCLUSION

The deposition testimony of William Crisman, taken alone, was sufficient to establish his knowledge of the critical facts of his injury and their cause many, many years before he filed suit in 1988. Week after week, year in and year out, William Crisman experienced observable maladies while at work and while coming into contact with various substances. Accepting William Crisman's testimony as true, whenever he went to work he had physical problems and when he went home all of his problems disappeared. These facts establish Crisman's knowledge years prior to his filing of suit — far more than the three (3) years permitted under the Jones Act and the General Maritime Law. The district court so found. The Fifth Circuit properly affirmed.

There is no conflict within the Fifth Circuit's decision affirming the district court. The Fifth Circuit ruled based on Crisman's deposition testimony, applying the proper legal standards. The facts here do not reveal any basis to defeat summary judgment. There is a total absence of any genuine issue of fact. There is also no conflict within the Fifth Circuit's ruling. The Petiton For A Writ of Certiorari submitted by William and Patricia Crisman should, therefore, be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the above and foregoing Brief In Opposition To Petition For Writ Of Certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit by respondent, ODECO, Inc., has been forwarded to counsel for William and Patricia Crisman, Richard Broussard and William Rutledge, Domengeaux & Wright, Post Office Box 3668, Lafayette, Louisiana 70502-3668, via the United States Postal Service, postage prepaid and properly addressed, on this 27th day of September, 1991.

MAURICE C. HERBERT, JR.
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